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In The
Supreme Court of the United States

October Term 1998

LAKE JAMES COMMUNITY VOLUNTEER FIRE DEPARTMENT, INCORPORATED,
Petitioner,

v.

BURKE COUNTY, NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

1. Did the Fourth Circuit erroneously fail to apply the unconstitutional conditions doctrine to a situation in which the availability of a governmental contract was conditioned on forfeiture of a federal constitutional right, erroneously conclude that waiver is a defense to an unconstitutional conditions claim, and misapply waiver and unconstitutional conditions analysis to the facts of this case?

PARTIES TO THE PROCEEDINGS

Petitioner, Lake James Community Volunteer Fire Department is a non-profit corporation properly established under North Carolina law. Petitioner was the Plaintiff in the lower court proceedings of this case and was the Appellee before the United States Court of Appeals for the Fourth Circuit.

Respondent, Burke County, North Carolina, is a county and body politic organized under North Carolina law. Respondent was a Defendant to the action in the lower court proceedings and was also the Appellant before the United States Court of Appeals for the Fourth Circuit.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Lake James Community Volunteer Fire Department, Inc. (hereinafter "Lake James"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit which Lake James seeks to have reviewed by this Court is reported at Lake James Community Volunteer Fire Department, Inc. v. Burke County, North Carolina, 149 F.3d 277 (4th Cir. 1998), and is reprinted in the Appendix (hereinafter "App.") at pages App.1-12. The opinion and judgment of the United States District Court for the Western District of North Carolina is unpublished and is reprinted at App. 13-36.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on July 15, 1998. [App. pp. 1-12]. Lake James timely filed a Petition For Rehearing And Suggestion For Rehearing En Banc on July 28, 1998. On August 5, 1998, the United States Court of Appeals for the Fourth Circuit requested the respondent, Burke County, North Carolina (hereinafter "Burke County"), to respond to Lake James' rehearing petition on or before August 17, 1998. On August 17, 1998, Burke County filed the Defendant's Appellant's Answer To Petition For Rehearing And Suggestion For Rehearing En Banc. On August 26, 1998, the United States Court of Appeals for the Fourth Circuit denied Lake James' request for rehearing. [App. p. 37]. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C. Gen. Stat. §69-25.11:

> After a fire protection district has been established under the provisions of this Article and fire protection commissioners have been appointed, changes in the area may be made as follows:
>
> . . . .

(4) In the case of adjoining fire districts having in effect a different rate of tax for fire protection, the board of county commissioners, upon petition of two thirds of the owners of the territory involved and after receiving a favorable recommendation of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected, may transfer such territory from one district to another and therefore relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as the board may deem proper. Upon receipt of such petition, the board of county commissioners shall set a date and time for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken.

STATEMENT OF THE CASE

A. Procedural History

On July 3, 1996, Lake James[1] filed a civil action in the Superior Court of Burke County, North Carolina,[2]

[1]Lakes James is a non-profit corporation properly established under North Carolina law for the purpose of providing fire protection services

seeking declaratory and injunctive relief against Burke County[3] on the basis of allegations that certain provisions of a fire protection service contract between Lake James and Burke County violated Lake James' federal and state constitutional rights and that Burke County had unlawfully retaliated against Lake James by insisting upon the inclusion of certain terms in this fire protection services contract because of Lake James' previous decisions to exercise certain federal and state constitutional rights. On the same date, the Superior Court entered a temporary restraining order prohibiting Burke County from declaring that Lake James had breached the terms and conditions of the fire protection services contract or attempting to terminate that contract. On July 22, 1996, Burke County removed this action from the Superior Court of Burke County, North Carolina, to the United States District Court for the Western District of North Carolina on the basis of that Court's federal question jurisdiction. On July 26, 1996, the Honorable Lacy H. Thornburg, United States District Judge for the Western District of North Carolina (hereinafter "the District Court"), entered a preliminary injunction enjoining Burke County from declaring that Lake James had breached the fire protection services contract or from terminating the contract during the pendency of this action.

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in the Lake James Fire District, a rural fire protection district created pursuant to N.C. Gen. Stat. §69-25.1 located in western Burke County, North Carolina. Contracting with a community volunteer fire departments such as Lake James is one way in which a North Carolina county may meet its statutory obligation to provide fire protection services in rural areas. N.C. Gen. Stat. §69-25.5.

[2]The Superior Court is the highest level trial court in North Carolina's General Court of Justice.

[3]Burke County is a county and body politic organized under North Carolina law located in the Western District of North Carolina. Burke County is governed by a five member body known as the County Commission.

On August 12, 1996, Burke County filed an Answer And Counterclaim in which Burke County denied the material allegations of Lake James' complaint and requested the Court to declare that Lake James had materially breached the fire protection services contract between Lake James and Burke County by initiating litigation against Burke County. On September 4, 1996, Lake James replied to Burke County's counterclaim. On October 1, 1996, Lake James requested leave of court to amend its complaint for the purpose of requesting a declaration by the Court that certain territorial transfers approved by Burke County were unlawful and should be declared null and void. The District Court allowed the proposed amendment on December 11, 1996. On December 23, 1996, Burke County filed an Amended Answer And Counterclaim denying the material allegations of Lake James' amendment.

After the completion of the discovery process, both Lake James and Burke County moved for summary judgment on March 31, 1997. On May 13, 1997, the District Court entered a Judgment And Memorandum and an Order granting summary judgment "on all claims" in favor of Lake James and granting Lake James permanent injunctive relief. In its decision, the District Court concluded that the "no challenge" provision of the fire protection services contract between Lake James and Burke County contravened the "unconstitutional conditions" doctrine by impermissibly depriving Lake James of its right to petition for redress of grievances and that two transfers of territory from the Lake James Fire District to another fire district were unlawful. [App. pp. 13 - 36]. On June 11, 1997, Burke County noted an appeal to the United States Court of Appeals for the Fourth Circuit (hereinafter "the Fourth Circuit") from the District Court's decision.

On July 15, 1998, a unanimous panel of the Fourth Circuit filed an opinion reversing the District Court's decision and remanding this case "for further proceedings in light of our holdings." Lake James Community Volunteer

Fire Department, Inc. v. Burke County, North Carolina, 149 F.3d 277, 282 (4th Cir. 1998). On July 28, 1998, Lake James filed a Petition For Rehearing And Suggestion For Rehearing En Banc. On August 5, 1998, the Fourth Circuit requested Burke County to respond to Lake James' rehearing petition. On August 17, 1998, Burke County filed a Defendant's-Appellant's Answer To Petition For Rehearing And Suggestion For Rehearing En Banc. On August 26, 1998, the Fourth Circuit denied Lake James' rehearing petition. [App. p. 37].

B. Substantive Facts

Lake James began providing fire protection services in the Lake James Fire District in 1969 and continually provided such services until the present controversy began in the spring of 1994. At that time, a group of individuals who referred to themselves as "Concerned Citizens" began requesting information concerning Lake James' operations from Lake James' Board of Directors and the Burke County staff and advanced a number of criticisms of the existing department. Supporters of the Concerned Citizens faction elected a majority of the members of Lake James' Board of Directors at the June 9, 1994, annual meeting.

After the election results had been announced, the firefighters who actually provided fire protection services in Lake James' territory met briefly and turned in their gear.[4] As a result, Burke County Fire Marshall Kevin Stewart (hereinafter "the County Fire Marshall") made arrangements for volunteer fire departments serving three adjoining fire districts to respond to fire calls in the Lake James Fire District. After eight days, during which no fires occurred, the firefighters reached an understanding with the new Board of Directors and returned to duty, allowing Lake James to resume the provision of fire protection services.

[4]The firefighters were not paid employees of Lake James; instead, they volunteered their time and services to Lake James.

In August, 1994, Bruce Ervin and Helen McDowell, two residents of the Lake James Fire District who were members of Lake James, initiated civil litigation in the Superior Court of Burke County, North Carolina, seeking to compel the newly-elected Concerned Citizens-controlled Board of Directors to convene a special membership meeting for the purpose of considering removing members of Lake James' Board of Directors pursuant to N.C. Gen. Stat. §55-8-08. After the filing of this civil action, the Board of Directors voted to conduct the requested removal election by mail. In November, 1994, the membership voted not to remove the existing directors, leaving the Concerned Citizens in control of Lake James.

On March 22, 1995, the Concerned Citizens-controlled Board of Directors voted five to two to cease providing fire protection in the Lake James Fire District. At approximately the same time, the Board proposed that Lake James be dissolved, with Lake James' existing territory to be divided among two adjoining fire districts. On March 27, 1995, Lake James paid $23,931.50 to Burke County for the purpose of returning fire tax money which had been paid to Lake James in exchange for its commitment to provide fire protection service from March 23, 1995, until June 30, 1995.[5] Given that it still had a statutory obligation under N.C. Gen. Stat. §69-25.5 to provide fire protection services in the Lake James Fire District, Burke County made arrangements with the fire departments serving adjoining fire districts to provide temporary fire protection service in the Lake James Fire District after receiving word of the Board's

[5]The monies used to support Lake James' operations came from the proceeds of a special tax levied by the Burke County Commission upon those owning property in the Lake James Fire District. N.C. Gen. Stat. §69-25.4. The Burke County Commission collects these tax payments and uses them to provide fire protection services in the relevant rural fire district in accordance with N.C. Gen. Stat. §69-25.5. N.C. Gen. Stat. §69-25.7. As a result, the only source of funding available to Lake James was its contract with Burke County.

action. On April 20, 1995, Burke County contracted with the West End Volunteer Fire Department, Inc. (hereinafter "West End"), the Town of Glen Alpine (hereinafter "Glen Alpine"), and the Oak Hill Fire and Rescue Protection Association, Inc. (hereinafter "Oak Hill"), to provide fire protection services in the Lake James Fire District through June 30, 1995. In August, 1995, Burke County executed additional contracts with West End, Glen Alpine, and Oak Hill to provide fire protection and first responder service in the Lake James Fire District for an additional period of time.

On April 6, 1995, Burke County filed suit against Lake James in the Superior Court of Burke County, North Carolina, alleging that Lake James had breached its contract with Burke County by canceling the existing fire protection services agreement and seeking to recover from Lake James "all equipment, fire trucks, other assets, and tax dollars currently sitting in bank accounts under [Lake James'] control which represent tax dollars or fire-tax dollars, or equipment and assistance provided by said fire tax dollars." In April, 1995, Bruce Ervin, a resident of the Lake James Fire District and a Lake James member, moved to intervene in Burke County's action against Lake James for the purpose of preventing the transfer of Lake James' assets to Burke County without the approval of Lake James' members as required by North Carolina law. On April 10, 1995, the Superior Court entered a temporary restraining order prohibiting the transfer of any Lake James assets to Burke County without approval by Lake James' membership. Subsequently, Bruce Ervin was permitted to intervene in Burke County's action against Lake James and obtained the issuance of a preliminary injunction which effectively continued this temporary restraining order in effect until a decision on the merits.

As this litigation proceeded, certain Lake James members circulated a petition seeking the removal of the Concerned Citizens-affiliated directors who had voted to cancel Lake James' contract with Burke County pursuant to

N.C. Gen. Stat. §55-8-08. When the Concerned Citizens-controlled Board of Directors failed to act on this petition, Brent Fox, a resident of the Lake James Fire District and a Lake James member, filed a civil action against Lake James in the Superior Court of Burke County, North Carolina, seeking the entry of an order compelling the convening of a special meeting of Lake James' membership to consider the removal of the Concerned Citizens-affiliated directors. On July 28, 1995, the Superior Court ordered that such a special membership meeting be held. After this judicial decision, the Concerned Citizens-affiliated directors conducted an expedited membership vote on their plan for dissolving Lake James, a proposal which the membership rejected. On August 21, 1995, immediately prior to the special meeting of Lake James membership which had been convened to consider removing them from office, the remaining Concerned Citizens-affiliated directors resigned.

After the resignation of the remaining Concerned Citizens-affiliated directors, Lake James began to reorganize under court supervision. On November 11, 1995, Lake James held an annual meeting and elected new directors, who immediately contacted Burke County and attempted to negotiate a new fire protection services contract with the County. As Lake James reorganized, individuals affiliated with the Concerned Citizens began to circulate petitions proposing the transfer of various portions of the Lake James Fire District to adjoining fire districts.[6] Residents of the Holiday Shores area and a small territory located on the Gwaltney Road petitioned to have their properties transferred from the Lake James Fire District to the West End and Oak

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[6]A transfer of territory from the Lake James Fire District to another fire district posed a serious financial threat to Lake James, since the owners of any property removed from the Lake James Fire District and added to another fire district would stop paying taxes to support service in the Lake James Fire District and begin paying taxes to support service in the new fire district. N.C. Gen. Stat. §69-25.12; N.C. Gen. Stat. §69-25.13.

Hill Fire Districts. Individuals affiliated with the Concerned Citizens circulated a petition to transfer territory along the St. Paul's Church and Powerhouse Roads from the Lake James Fire District to the Glen Alpine Fire District (hereinafter "the Powerhouse Road petition"). The Powerhouse Road petition was delivered to the Burke County staff in October or November, 1995, and presented to the Burke County Commission on November 25, 1995, at which time the County Commission was scheduled to consider whether to call for a public hearing concerning the Powerhouse Road petition pursuant to N.C. Gen. Stat. §65-25.11. A few minutes before the November 25, 1995, County Commission meeting began, Rodney Hall, a newly-elected member of Lake James' Board of Directors, submitted documentation that thirteen individuals who had signed the Powerhouse Road petition wished to withdraw their names from that document. Although the Burke County staff expressed concern that the Powerhouse Road petition lacked sufficient signatures to comply with N.C. Gen. Stat. §69-25.11(4), the County Commission voted to hold a public hearing on the Powerhouse Road petition at the December, 1995, meeting and established a December 7, 1995, cut-off date for adding signatures to or withdrawing signatures from the Powerhouse Road petition.

Prior to the cut-off date, proponents of the Powerhouse Road petition and members of Lake James' newly-elected Board of Directors submitted signatures to the Burke County staff in support of their respective positions. After reviewing this information, the Burke County staff validated the signatures of 154 persons as supportive of the Powerhouse Road petition, determined that there were 228 property owners in the affected area, and effectively concluded that 152 property owners needed to sign the Powerhouse Road petition in order to comply with the

relevant statute.[7] On December 18, 1995, Lake James corresponded with the Burke County staff for the purpose of informing Burke County that three property owners and four tax exempt landowners had been omitted from staff's tabulation of affected landowners and that the inclusion of these property owners in the relevant calculation established that the Powerhouse Road petition lacked the 155 signatures required by N.C. Gen. Stat. §69-25.11(4). On December 19, 1995, Lake James informed the County Fire Marshall in writing that the boundary of the Powerhouse Road petition area bisected several other properties and that the eleven owners of these properties should be included in the necessary signature calculation, a fact which raised the statutorily-required number of signatures to 164. Lake James presented this information and supporting arguments to the County Commission at the December 19, 1995, public hearing. Although an earlier Burke County Commission had been advised by a former county attorney that tax exempt property must be included in the counting process, the Burke County Commission voted three to two to approve the Powerhouse Road petition and transferred the area in question to the Glen Alpine Fire District effective June 30, 1996.

Lake James and Burke County continued to discuss a new fire protection services contract during the pendency of the Powerhouse Road petition. As these discussions progressed, Lake James' equipment passed a properly-conducted service test, Lake James' building was brought up to code, and Lake James passed an inspection conducted by the North Carolina Department of Insurance. After Burke County failed to act on a request for the advancement of sufficient money to permit the department to reopen, Lake James borrowed the necessary funds from a bank. At the

[7]Given the existence of different fire tax rates in the Lake James and Glen Alpine Fire Districts, the propriety of the proposed transfer depended upon the application of N.C. Gen. Stat. §69-25.11(4).

conclusion of this process, a proposed contract was negotiated between Lake James and the Burke County staff.

When the proposed contract was presented to the Burke County Commission on January 16, 1996, Commissioner James Reid Simpson (hereinafter "Commissioner Simpson") moved that the proposed contract be modified as follows:

> Provided, however, that this Contract shall contain a provision allowing any citizen or group in the Lake James Fire Tax District to petition the County to be annexed into another fire tax district without any further consent of the Lake James Volunteer Fire Department or with the consent of the Lake James Volunteer Fire Department being contractually presumed (the "Consent Provision"); and
>
> FURTHER RESOLVED, that this Contract shall further provide that should the Lake James Volunteer Fire Department refuse its consent, or challenge in the judicial system or otherwise the legality of this Consent Provision, or challenge the legality of any changes in their Fire Tax District Lands under N.C.G.S. §69-25.11 taking place effective as of June 30, 1996, that any such actions will constitute a material breach of the Contract resulting in the immediate termination of the Contract; and
>
> FURTHER RESOLVED, that this Consent Provision shall not be removed or excluded from this or any contract with the Lake James Volunteer Fire Department by any subsequent action of this Board without the unanimous vote of the Burke County Board of Commissioners.

The Burke County Commission approved Commissioner Simpson's motion by a vote of three to two. As a result, a revised contract between Lake James and Burke County was prepared by Burke County which included the following Paragraph No. 11(b)(iv):

> The Lake James Community Volunteer Fire Department, Inc., specifically agrees to allow any citizen, group of citizens, and/or property owner being served by the Lake James Community Volunteer Fire Department, Inc. (or property owners having property within the Lake James Fire Tax District) to petition the County to be considered for an annexation into another Fire Tax District (reference Chapter 69 of the North Carolina General Statutes) without any further consent of the Lake James Community Volunteer Fire Department, Inc. Further that the parties agree that any consent required by Chapter 69 with regard to such a petitioning process shall be presumed to have been given by the Lake James Community Volunteer Fire Department, Inc. (This paragraph 11.B.iv is hereinafter referred to as "Consent Provision"). However, the parties agree that should the Lake James Community Volunteer Fire Department, Inc. refuse its consent to any above-referenced petition or challenge in the judicial system or otherwise the legality of the above-referenced Consent Provision, or otherwise challenge the legality of any of the changes in the Fire Tax District lines under N.C.G.S. §69-25.11 taking place effective as of or after June 30, 1996, then the parties agree any such action will constitute a

> material breach of this Contract resulting in immediate termination of the contract. . . .

[App. p. 42-43]. In response, Lake James proposed a revised contract to Burke County which was identical to that proposed by Burke County except for the deletion of Paragraph No. 11(b)(iv). The Burke County Commission rejected Lake James' counterproposal by a vote of two to two. Faced with the Hobson's choice of either executing a proposed contract which included Paragraph No. 11(b)(iv) or losing the ability to reopen due to the absence of a contract with Burke County, Lake James executed the contract approved by the County Commission on February 26, 1996. On March 1, 1996, Lake James reopened and resumed providing fire protection services.

At the same approximate time, supporters of the Concerned Citizens group petitioned to transfer the East Shores subdivision and certain other territory adjacent to that covered by the Powerhouse Road petition to the Glen Alpine Fire District (hereinafter "the East Shores petition"). The validity of the East Shores petition hinged upon the lawfulness of the Powerhouse Road petition, since N.C. Gen. Stat. §69-25.11 limits territorial transfers to property adjacent to some portion of the transferee district. On August 20, 1996, the Burke County Commission scheduled a public hearing on the East Shores petition and established cut-off dates for the submission of additional signatures on and challenges to the East Shores petition. In apt time, Lake James submitted the names of individuals who wished to withdraw their signatures from the East Shores petition and challenged both the petition and the procedures utilized in the petitioning process on a number of grounds, including the invalidity of the Powerhouse Road petition. On September 17, 1996, after the initiation of the present litigation, the Burke County Commission approved the East Shores petition by a three to one vote.

BASIS FOR FEDERAL JURISDICTION

The United States District Court for the Western District of North Carolina had jurisdiction over Lake James' federal constitutional claims pursuant to its federal question and removal jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1441(b) and over Lake James' state constitutional and statutory claims pursuant to its supplemental and removal jurisdiction under 28 U.S.C. §1367 and 28 U.S.C. §1441(c).

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit erred by failing to apply the unconstitutional conditions doctrine to a situation in which the availability of a governmental contract was conditioned on forfeiture of a constitutional right, inappropriately concluding that waiver is a defense to an unconstitutional conditions claim, and improperly applying waiver and unconstitutional conditions analysis to the facts of this case.

The constitutional right to petition the Government for redress of . . . grievances" under the First and Fourteenth Amendments to the United States Constitution "includes a reasonable right of access to the courts." Hudson v. Palmer, 468 U.S. 517, 523, 104 S.Ct. 3194, _____, 82 L.Ed.2d 393, 401. See also: California Motor Transportation Company v. Trucking Unlimited, Inc., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The "no challenge" provision of Paragraph No. 11(b)(iv) of the fire protection services contract between Lake James and Burke County, which prohibited Lake James from initiating litigation against Burke County for the purpose of challenging either the consent provision or any territorial transfer (such as the

Powerhouse Road petition, which the Burke County Commission had recently approved, or the East Shores petition, which was then being circulated) to be effective as of or after June 30, 1996, clearly required Lake James to forgo this federal constitutional right. As a result, the only way in which Lake James could obtain the fire protection services contract necessary for its survival was to forfeit its federal constitutional right to access to the courts.

The "unconstitutional conditions" doctrine has evolved to deal with governmental attempts to condition the availability of public benefits upon the forfeiture of federal constitutional rights.

> Recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," Laird v. Tatum, 408 U.S. 1, 11, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), our modern "unconstitutional conditions" doctrine holds that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech" even if he has no entitlement to that benefit.

Board of County Commissioners v. Umbehr, 518 U.S. 668, 674, 116 S.Ct. 2342, _____, 135 L.Ed.2d 843, 851 (1996) citing Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, _____, 33 L.Ed.2d 570, 577 (1972). See also: Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Sherbert v. Varner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). A plaintiff is entitled to relief under the "unconstitutional conditions" doctrine in the event that the prohibited conduct implicates "matters of public concern" which outweigh the governmental interest "'in

promoting the efficiency of the public services it performs.'" Board of County Commissioners v. Umbehr, 518 U.S. 668, 675-676, 116 S.Ct. 2342, _____, 135 L.Ed.2d 843, 852 (1995).

Lake James argued, and the District Court found, that the "no challenge" provision constituted an invalid constitutional condition which entitled Lake James to relief. The District Court found that the "no challenge" provision impaired Lake James' right of access to the courts guaranteed by the First and Fourteenth Amendments. [App. pp. 18-19. The District Court concluded that the "no challenge" clause had the required nexus to public rather than private concerns given that ensuring adequate revenues to permit proper fire service and properly allocating those revenues is indubitably a matter of public concern and that the "no challenge" provision effectively precluded Lake James from challenging unlawful territorial transfers which implicated these concerns. [App. p. 20]. The District Court further found that a proper balancing of the relevant interests favored Lake James. On the one hand, the District Court determined that the "no challenge" provision completely deprived local citizens of input from those "'who are often in the best position to know what ails the agency for which they work,'" Board of Commissioners v. Umbehr, 518 U.S. 668, 674, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843, 851 (1995), and "muzzles the very watchdog most likely to seek redress for improper governmental activity." [App. pp. 21-22]. The District Court found, on the other hand, that the "no challenge" provision did not serve any governmental need except Burke County's desire to stifle Lake James' access to the Courts. Although Burke County claimed that the "no challenge" provision assisted in "ensuring consistently reliable fire protection for its citizens" by protecting "the public's expectation to choose, subject to the County's approval, which fire district would serve their needs," the District Court pointed out that this alleged "right to choose" was significantly limited by the necessity for compliance

with N.C. Gen. Stat. §69-25.11(4). [App. p. 22]. Furthermore, the District Court noted the complete absence of any evidence "tending to show that challenges to the legality of fire territory transfers would have led or would lead to reduced fire-service reliability." [App. p. 22].[8] Instead, as the District Court concluded, the only effect and obvious purpose of the "no challenge" provision was to prevent Lake James from challenging questionable territorial transfers which the Burke County Commission had approved or might approve. [App. p. 23].[9] Had fire service reliability been Burke County's real aim, the District Court held that much more narrowly drawn out contract language would have sufficed to protect this interest. [App. P. 23]. As a result, Lake James contends and the District Court found that the "no challenge" provision failed the "balancing" test employed to determine the validity of an "unconstitutional condition" and should be invalidated.[10]

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[8] When asked if there was any need to "include paragraph 11(b)(iv) into the Lake James contract as a matter of fire protection," Burke County Emergency Services Director Clint Patton responded, "Not for fire protection purposes, no." [Patton Dep., pp. 67-68]. Similarly, when asked whether he saw "any reason related to the provision of fire protection services to justify the inclusion of paragraph 11(b)(iv) into the contract," the County Fire Marshall responded, "No, sir, no validity as far as fire protection was concerned." [Stewart Dep., p. 80]. When asked to explain how the consent provision furthered fire service reliability goals, Commissioner Simpson was unable to do so.

[9]Commissioner Simpson testified in his deposition that he proposed the "no challenge" provision because "a lot of issues concerning this fire department were taken to the judicial system and that all the folks involved were spending a lot of their own money or fire tax money or other public funds using the judicial system as a forum in which their disputes could at least be made public if not settled." [Simpson Dep., p. 25].

[10]The District Court further found that Burke County acted unlawfully in approving both the Powerhouse Road and East Shores petitions. [App. pp. 24-29]. Burke County did not challenge these rulings before the Fourth Circuit. As a result, assuming that the Fourth Circuit's decision to

The logic employed by the Fourth Circuit in reversing the District Court's decision was diffuse, difficult to follow, and inconsistent with the analysis uniformly applied by this Court for the purpose of evaluating cases in which the availability of governmental benefits was conditioned upon the forfeiture of constitutional protections. First, the Fourth Circuit attempted to determine, in reliance upon this Court's decisions in Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), and D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), neither of which involved the "unconstitutional conditions" doctrine, whether Lake James acted voluntarily in executing the contract and whether the public policy harms resulting from the "no challenge" and "consent" provisions outweighed the interest promoted by the enforcement of those provisions, an analysis to be undertaken on the basis of a presumption of enforceability. Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 280 (4th Cir. 1998). As a result of the fact that Lake James understood the import of the "consent" and "no challenge" provisions, had the assistance of counsel, and had the option of not entering into any contract at all,[11] the Fourth Circuit found the necessarily "voluntariness." Lake James Community Volunteer Fire Department v. Burke County, NC 149 F.3d 277, 281 (4th Cir. 1998). Moreover, given its conclusion that the "consent" and "no challenge" provisions furthered the public policy interest in allowing citizens to choose the fire department from which they wished to take

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overturn Paragraph No. 11(b)(iv) of the fire protection services contract is reversed, the District Court's decision with respect to these territorial transfers would be reinstated.

[11]Under the Fourth Circuit's preferred analysis, it is difficult to see how any set of facts not involving actual duress or coercion would be sufficient to invalidate contract provisions.

service, that these provisions were "narrowly tailored" to effectuate this interest in citizen choice, and that Burke County had no obligation to contract with Lake James at all, the Fourth Circuit concluded that its preferred balancing test favored enforceability. Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 281-282 (4th Cir. 1998). Almost as an afterthought, the Fourth Circuit stated that the "unconstitutional conditions" doctrine ."does not categorically preclude parties from negotiating contractual relationships that include waivers of constitutional rights such as a covenant not to sue" and that "the public interest . . . in favor of the citizen's right to select a reliable fire department of their choice" outweighed Lake James' "interest in its continued existence to provide fire protection to the Lake James Fire District." Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 282 (4th Cir. 1998).[12] The Fourth Circuit's approach to this case is fundamentally in error and should be reviewed by this Court.[13]

A. The Fourth Circuit failed to apply the "unconstitutional

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[12]Lake James had claimed that Burke County's actions violated Article I, Section 18 of the North Carolina Constitution as well as the First and Fourteenth Amendments to the United States Constitution. The Fourth Circuit rejected Lake James' state constitutional challenge to Burke County's actions on the same grounds that it rejected Lake James' federal constitutional claim. As a result, the validity of Lake James' state constitutional claim rises and falls with the validity of its federal constitutional claim.

[13]The District Court decided this case on the basis of the parties' cross motions for summary judgment. [App. pp. 16-17]. Neither lower court concluded that there was any dispute as to a genuine issue of material fact. As a result, the only issue before both the District Court and the Fourth Circuit was the extent to which either party was entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

conditions" doctrine in reversing the district court's opinion.

The District Court analyzed the contested provisions of the contract under the "unconstitutional conditions" doctrine and concluded that the "no challenge" provision constituted an impermissible infringement upon Lake James' right of access to the courts. The Fourth Circuit, on the other hand, defined the relevant issue as "whether the Fire Department's agreement to consent to citizens' petitions and not to challenge them in court is enforceable." Lake James Community Volunteer Fire Department, Inc. v. Burke County, North Carolina, 149 F.3d 277, 280 (4th Cir. 1998). Given that a contract which a party enters into voluntarily "will be enforced unless the interest promoted by its enforcement is outweighed by the public policy harm resulting from its enforcement," citing Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 954 L.Ed.2d 405 (1987); the claim that "simply because a contract includes a waiver of a constitutional right does not render the contract per se unenforceable," citing D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), and its conclusion that the public policy interests furthered by the disputed provisions outweighed the harm worked by enforcing these provisions against Lake James. the Fourth Circuit held the disputed contract provisions to be enforceable. As a result, the Fourth Circuit treated this case as a dispute involving a garden-variety commercial contract instead of applying the "unconstitutional conditions" doctrine.

This Court has developed the "unconstitutional conditions" doctrine for the purpose of analyzing situations in which, "even though a person has no 'right' to an available governmental benefit," the government withholds that benefit "on a basis that infringes his constitutionally-protected interests." Perry v. Sinderman, 408 U.S. 593, 597,

92 S.Ct. 2694, _____33 L.Ed.2d 570, 577 (1972). The facts of this case, in which Burke County refused to contract with Lake James unless Lake James agreed not to seek access to the courts for the purpose of challenging territorial transfers which the District Court held to have been unlawful, fall squarely withing the ambit of the "unconstitutional conditions" doctrine. Although the Fourth Circuit did make reference to the "unconstitutional conditions" doctrine near the conclusion of its opinion, this reference clearly appears in the context of a discussion of the contentions advanced by Lake James and does not constitute a statement of the basis for the Fourth Circuit's decision. Neither of the two decisions by this Court upon which the Fourth Circuit placed principal reliance involved an application of the "unconstitutional conditions" doctrine; instead, the decisions in Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), and D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 127 (1972), involved the validity of contracts executed in essentially private contexts and the decision in Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), did not even involve a claim that the disputed contract provision was unenforceable for constitutional reasons.[14] As a result, the Fourth Circuit decided this case on the basis of generalized waiver principles instead of an application of the "unconstitutional conditions" doctrine.

Until the Fourth Circuit's decision in this case, the federal courts of appeal had uniformly decided similar controversies by applying the "unconstitutional conditions"

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[14]The same is true of the other decisions cited in this portion of the Fourth Circuit's analysis, including Johnson v. Zerbet, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938); Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); Snepp v. United States, 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980); and AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

doctrine. Eg. Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985); Fraternal Order of Police Lodge No. 5 v. Philadelphia, 812 F.2d 105 (3d Cir. 1987); G&V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071 (6th Cir. 1994). By purporting to decide this case using a generalized voluntariness and waiver analysis instead of by applying the unconstitutional conditions doctrine, which has expressly been developed to deal with efforts to condition the availability of governmental benefits on the forfeiture of important federal constitutional rights, the Fourth Circuit has introduced a considerable element of confusion into the law governing the governmental contracting process and has either "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," Rule 10(a) of the Rules of the United States Supreme Court, or "decided an important question of federal law that [either] has not been, but should be, settled by this Court, or . . . decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c) of the Rules of the United States Supreme Court.[15] As a result, this Court should grant certiorari to permit review of the Fourth Circuit's decision.

B. The Fourth Circuit's voluntariness and waiver analysis overlooks factors previously deemed important by this Court which should be considered in an appropriate

[15]The Fourth Circuit's decision to decide this case on generalized voluntariness and waiver analysis instead of the "unconstitutional conditions" doctrine was particularly harmful to Lake James given the fact that the Fourth Circuit's balancing test presumes enforceability while the "unconstitutional conditions" doctrine adopts a contrary presumption. Rosenberger v. Rector and Visitors of the University of Virginia, 18 F.3d 269 (4th Cir. 1994), rev'd on other grounds, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

balancing of the affected interests.

Assuming, without in any way conceding, that the Fourth Circuit adopted the appropriate test for analyzing the validity of the "consent" and "no challenge" provisions of the fire protection services contract, the Fourth Circuit failed to properly analyze the relevant facts under that test. A careful reading of both Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1186, 94 L.Ed.2d 405 (9187), and D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), establishes that a valid contractual waiver of a federal constitutional right must be first determined to be voluntary,[16] a condition which does not exist in cases involving "unequal bargaining power or overreaching," a "contract of adhesion," or a refusal to deal in the absence of the disputed provisions. D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 186, 92 S.Ct. 725, _____, 31 L.Ed.2d 124, 134 (1972). The District Court found, and the Fourth Circuit did not dispute,[17] that the present contract involved parties with vastly unequal bargaining power and resulted in a contract of adhesion in which Burke County refused to deal with Lake James in the

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[16]The test adopted by the Fourth Circuit requires that a valid waiver also be knowing and intelligent. Lake James Community Volunteer Fire Department, Inc. v. Burke County, N.C. 149 F.3d 277, 281 (4th Cir. 1998). Lake James does not dispute that it knew of and understood the "consent" and "no challenge" provisions when it executed the fire protection services contract.

[17]The Fourth Circuit in fact stated that "making a choice rendered difficult because of a weak bargaining position of its own creation does not render the execution of the contract involuntary," Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 281 (1998), a statement which simply flies in the face of this Court's recognition in D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 186, 92 S.Ct. 775, _____31 L.Ed.2d 124, 134 (1972), that voluntariness does not exist in a case of unequal bargaining power.

absence of the "consent" and "no challenge" provisions and in which Lake James received no additional benefit as the result of the inclusion of the disputed provisions in the contract. The simple fact of the matter is that Burke County gave Lake James the choice of either signing a contract containing the "consent" and "no challenge" provisions or suffering corporate death, an outcome which is hardly conducive to voluntary action.

Even if the requisite voluntariness was present here, which Lake James denies, the Fourth Circuit believed that it was still required to determine whether "the interest promoted by its enforcement is outweighed by the public policy harms resulting from enforcement." Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 298 (4th Cir. 1998). The Fourth Circuit misapplied this balancing test, which it adopted from Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), by describing the governmental interest as a free choice of fire protection providers for citizens when no such unlimited right is available under North Carolina law, N.C. Gen. Stat. §69-25.11(4); by overlooking the fact that the control of Lake James had been wrested from the Board of Directors which caused the second (and much more protracted) of the two shutdowns upon which the Fourth Circuit placed such reliance in justifying the legitimacy of the County's concerns; by failing to mention the absence of any fire protection justification for either of the disputed provisions; and by omitting any reference to Commissioner Simpson's admission that the essential purpose of these provisions was to prevent Lake James from seeking access to the Courts. The Fourth Circuit's description of the disputed contract provisions as "narrowly tailored" to further the County's perceived interest is simply illogical given that the "no challenge" provision does nothing to facilitate legally appropriate territorial transfers. Finally, the Fourth Circuit gave absolutely no weight to and, in fact, never explicitly mentioned, the most

important interests favoring Lake James' position, which were the fact that the "consent" and "no challenge" provisions deprived the public of the services of the entity best positioned to resist unlawful territorial transfers and the fact that Burke County's position amounted to an attempt to immunize itself from liability for an unlawful territorial transfer which it had already approved. As a result, the Fourth Circuit simply misapplied the balancing test which it deemed appropriate.

Assuming that the Fourth Circuit has properly identified the test which should be used to analyze the validity of governmental attempts to condition the availability of benefits upon the renunciation of important federal constitutional rights, it should still be required to apply this test in a manner consistent with this Court's decisions. The Fourth Circuit's application of its preferred test is simply inconsistent with this Court's decisions and involves "an important question of federal law in a way that conflicts with relevant decisions of this Court." Rule 10(c) of the Rules of the United States Supreme Court. As a result, the Court should grant certiorari to review the Fourth Circuit's decision.

C. The Fourth Circuit erroneously concluded that an unconstitutional conditions claim is subject to a waiver defense.

The Fourth Circuit clearly held that waiver was a valid defense to Lake James' claim. In the event that the Fourth Circuit's decision does, in some way, amount to an application of the "unconstitutional conditions" doctrine, which Lake James denies, its apparent conclusion that waiver is a defense to an "unconstitutional conditions" claim is inappropriate given that recognition of such a defense would allow governments to do exactly what the

"unconstitutional conditions" doctrine is intended to prohibit. In fact, the entire purpose of the "unconstitutional conditions" doctrine is to provide a tool for analyzing the validity of governmental attempts to get other parties to forgo the exercise of certain federal constitutional rights. Lake James is not aware of any decision by a federal court of appeals recognizing the validity of a waiver defense in an "unconstitutional conditions" case.[18] On the other hand, the First, Third, and Sixth Circuits have decided that waiver is not a defense to such a claim. Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985); Fraternal Order of Police Lodge No. 5 v. City of Philadelphia, 812 F.2d 105 (3rd Cir. 1987); G&V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071 (6th Cir. 1994). As a result, the Fourth Circuit's apparent recognition of a waiver defense to an "unconstitutional conditions" claim is ~~"in~~ conflict with the decision of another United States court of appeals on the same important matter," Rule 10(a) of the Rules of the United States Supreme Court, and involves "an important question of federal law that has not been, but should be, decided by this Court." Rule 10(c) of the Rules of the United States Supreme Court. As a result, this Court should grant certiorari to review the Fourth Circuit's decision.

D. Assuming that waiver is a defense to an unconstitutional conditions claim, the Fourth Circuit erred by finding the alleged waiver at issue here to have been valid.

[18] The Ninth Circuit's decision in Leonard v. Clark, 12 F.3d 885 (9th Cir. 1993), does not support the result apparently reached by the Fourth Circuit since that decision did not mention the "unconstitutional conditions" doctrine.

Assuming that waiver is a defense to an "unconstitutional conditions" claim, which Lake James denies, any such waiver of an important federal constitutional right must, at an absolute minimum, have been "voluntary, knowing, and intelligent." D.H. Overmeyer Company v. Frick Company, 405 U.S. 174, 185, 92 S.Ct. 775, _____, 31 L.Ed.2d 124, 134 (1992).[19] The Fourth Circuit never explicitly addressed the voluntariness of Lake James' purported waiver of its "unconstitutional conditions" claim in its opinion. Had it done so, the Fourth Circuit could not have deemed acceptance of the "consent" and no "challenge" provisions to have been to have been voluntary acts on the part of Lake James because they were part of a contract of adhesion presented to Lake James on a "take it or leave it" basis under circumstances involving significantly unequal bargaining power when exercise of Lake James' alleged right to choose not to execute the proposed contract would have meant its absolute extermination as a viable economic entity. By treating Lake James as having "voluntarily" waived its right to assert a constitutional claim against Burke County, the Fourth Circuit decided an important issue of federal law which should be resolved by this Court or decided an important question of federal law in a manner inconsistent with a decision of this Court. Rule 10(c) of the Rules of the United States Supreme Court. As a result, the Court should grant certiorari to review the Court of Appeals' decision.

E. The Fourth Circuit misapplied the balancing test which must be conducted in

[19]Assuming that waiver is a defense to an "unconstitutional conditions" claim and that the standard discussed in the text is, for some reason, inapplicable, this Court should determine the standard which should be used in evaluating the validity of such waivers.

"unconstitutional conditions" cases.

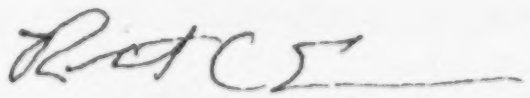
At the very end of its opinion, the Fourth Circuit attempted to conduct a balancing of the type required in "unconstitutional conditions" cases. The Fourth Circuit's analysis is fatally defective for a number of reasons. First, the Fourth Circuit described the relevant governmental interest as "the citizen's right to select a reliable fire department of their choice," Lake James Community Volunteer Fire Department, Inc. v. Burke County, NC 149 F.3d 277, 282 (4th Cir. 1998); no such unfettered right exists under North Carolina law. N.C. Gen. Stat. §69-25.11(4). Moreover, in weighing this purported governmental interest, the Fourth Circuit overlooked the undisputed record evidence tending to show the absence of any fire protection justification for the disputed contract provisions, the fact that Commissioner Simpson essentially admitted that the primary purpose of the disputed provisions was to prevent Lake James from seeking access to the courts, the fact that Lake James had passed all applicable inspections, and the fact that the directors who caused the second of the two shutdowns upon which the Fourth Circuit placed such heavy emphasis were no longer in control of Lake James. As if this error was not enough, the Fourth Circuit misapplied the other prong of the relevant balancing test as well. Instead of evaluating all relevant factors, including the benefits to be derived from Lake James' ability to point out and stop unlawful governmental actions (such as the invalidity of the Powerhouse Road and East Shores petitions), the Fourth Circuit merely focused upon and minimized Lake James' interest in its own continued existence, completely overlooking the fact that preventing Lake James from contesting improper territorial transfers would facilitate unlawful governmental action and diminish the adequacy of the fire protection provided to those individuals who took service from Lake James. As a result, the Fourth Circuit has

decided an important question of federal law in a manner inconsistent with prior decisions of this Court, Rule 10(b) of the Rules of the United States Supreme Court, and should be the subject of further review.

F. CONCLUSION

The Fourth Circuit's decision is worthy of certiorari review for many reasons. It has introduced an unfortunate lack of clarity into the law which should be applied in cases, such as this one, in which the availability of governmental benefits is conditioned upon the forfeiture of federal constitutional rights. It appears to have recognized a waiver defense to an "unconstitutional conditions" claim, an outcome rejected by every other federal court of appeals which has considered this issue. The Fourth Circuit has misapplied both its own preferred test for evaluating the issues presented by this case and the test which should be applied under the "unconstitutional conditions" doctrine. Finally, the Fourth Circuit has countenanced an egregiously unfair result. As a result, Lake James requests that a writ of certiorari issue to review the Fourth Circuit's decision.

Respectfully submitted, the 24th day of November, 1998.



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